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Supreme Court of the United States

October Term, 1961

No. ~~778~~ 79

VIRGIL A. WOOD, WILLIAM W. ROBERTS, BATES HUTSON FORD, ESSIE E. GORDON, WILLIAM G. ROBERTS, RALPH REAVIS, JAMES A. TUCKER, ELIJAH J. REGULUS, JON E. CRAWFORD, LANKSFORD E. HANKINS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

MELVIN L. WULF,
FRANK E. SCHWELB,
American Civil Liberties Union,
156 5th Avenue,
New York 10, N. Y.

JOSEPH A. JORDAN, JR.,
EDWARD A. DAWLEY, JR.,
LEONARD W. HOLT,
721 E. Brambleton Avenue,
Norfolk 10, Virginia.

HENRY HALVOR JONES,
SIMON LAWRENCE CAIN,
815 Fifth Street, N.W.,
Washington 1, D. C.,
of Counsel.

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Virginia Supreme Court of Appeals entered on October 12, 1961 affirming the judgment of the Corporation Court of the City of Lynchburg, Virginia, holding petitioners guilty of the crime of trespass.

Opinion Below

The Corporation Court of Lynchberg did not issue an opinion. The opinion of the Virginia Supreme Court of Appeals appears as Appendix "A" to this petition.

Jurisdiction

The judgment of the Virginia Supreme Court of Appeals was entered on October 12, 1961. On January 2, 1962, Mr. Justice Whittaker extended the time for filing this petition to and including March 8, 1962. The jurisdiction of this Court is based on 28 U. S. C. § 1257(3).

Questions Presented

1. Whether Virginia denied petitioners the equal protection of the laws by licensing a privately owned establishment to sell food to the public and acquiescing in and encouraging that establishment's refusal, in conformance with Virginia custom and policy, to serve petitioners and other Negroes at its lunch counter by reason of their race.

2. Whether Virginia's arrest and conviction of petitioners for trespass, as a result of their attempt to seek service at that establishment, constituted state enforcement of racial discrimination denying petitioners the equal protection of the laws.

3. Whether petitioners at their trial, were denied the equal protection of the laws and were deprived of their liberty and property without due process of law where:

(a) The race of each potential juror was marked on the jury list from which the jury which convicted petitioners was selected;

(b) Petitioners were refused the right to inquire of prospective jurors whether they belonged to organizations promoting or practicing racial hatred;

(c) Petitioners' trial was held in a segregated courtroom; and

(d) The trial judge demonstrated his bias by repeatedly and unwarrantedly rebuking defense

counsel and twice holding him in contempt as a result of counsel's diligent but courteous attempts to protect petitioners' constitutional and other rights.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment 14, Section 1:

> "No State • • • shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code of 1950, Section 18.1-173, as amended by Virginia Laws of 1960, Ch. 97:

> "If any person shall without authority of law go upon or remain upon the lands, *buildings* or premises of another, *or any part, portion or area thereof,* after having been forbidden to do so, *either orally or in writing,* by the owner, lessee, custodian or other person lawfully in charge *thereof,* or after having been forbidden to do so by a sign or signs posted on *such lands, buildings, premises or part, portion or area thereof* at a place or places where *it or* they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one *thousand* dollas or by confinement in jail not exceeding *twelve months,* or by both such fine and imprisonment.
>
> • • •
>
> *An emergency exists and this act is in force from its passage.* (Italics added; the portions italicized represent the 1960 Amendment.)

Statement of the Case

Petitioners are Negroes (all but two of them clergymen) who participated in sit-in demonstrations in Lynchburg, Virginia, on February 13, 1961 and February 21, 1961. Petitioners Gordon, William G. Roberts, Reavis, Tucker

and Regulus, were arrested in the morning of February 13th. Petitioners Crawford and Hankins were arrested in the afternoon of February 13th. Petitioners Wood, William W. Roberts and Ford were arrested in the afternoon of February 21st. The facts of each arrest are identical with minor variations not material to the case. The recitation of the facts will treat the events collectively.

Petitioners entered the premises of the Patterson Drug Company, a privately owned business establishment (T. 72).[1] At least three of the petitioners purchased articles for sale such as gum, candy, and cigarettes (T. 92-). They then seated themselves at the lunch counter (T. 67, 70), which was within the confines of the business premises open to the public (T. 65). The two petitioners arrested in the afternoon of February 13th sat at a lunch table in the same portion of the store (T. 70). Petitioners requested something to eat (T. 92, 93). On each occasion, William F. Patterson, Vice-President of the Patterson Drug Company (T. 65), told the petitioners that he declined to serve them and asked them to leave the store (T. 68-69, 70). When petitioners made no move to leave, Mr. Patterson called the police (*ibid.*).

On the arrival of the police, Mr. Patterson, in the presence of Capt. W. E. Gilliam of the Lynchburg Police Department, again instructed each of the petitioners to leave the premises (T. 42, 46, 48-49). Capt. Gilliam advised each of the petitioners that if they did not leave, they would be trespassers and liable to arrest (*ibid.*).

In each case, the petitioners were not dressed in any unusual way (T. 55, 62, 64) and were not disorderly (T. 55,

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[1] "T." refers to the transcript of the trial in the Corporation Court for the City of Lynchburg which is part of the record but contained in a separate binder. Consecutive references within the same parentheses refer chronologically to the three series of demonstrations.
"R." refers to the accompanying record.

63, 64), nor did they damage or destroy any property (T. 55, 63). Petitioners exhibited no animosity (T. 64), nor, indeed, did they speak at all (T. 55).

Having been asked to leave after being advised of the law, and refusing to leave, petitioners were arrested by Capt. Gilliam (T. 44, 47-48, 48-49).

All the petitioners are Negro (T. 93-94) and Mr. Patterson testified that it was for that reason alone he refused to serve them (T. 75-76).

Mr. Patterson testified that his store, which operates its lunch counter under a business license (T. 72), will generally serve any person who enters (T. 75). At the time of the demonstration, other persons were being served food at the lunch counter (T. 85-86). There are no signs in the store indicating that Negroes would not be served food (T. 81).

After petitioners were arrested, warrants were sworn out against each of them by Capt. Gilliam (T. 35). Petitioners were tried in the Corporation Court in the City of Lynchburg before a jury on April 5 and 6, 1961.

Petitioners were each found guilty of trespass and punishment was fixed at $100 fine and 90 days in jail for each (T. 124-126). The convictions were appealed to the Virginia Supreme Court of Appeals, and in a decision handed down on October 12, 1961, the convictions were affirmed (R. 17).

How the Federal Questions Were Raised

(a) The Federal questions relating to the first two questions presented in this petition were raised in the following manner:

1. Petitioners moved to dismiss the charges on the ground that § 18.1-173 of the Virginia Code was applied

in violation of the due process and equal protection clauses of the Fourteenth Amendment "solely to punish and coerce persons who are members of the so called 'Negro' race * * * who do not wish to observe and conform to private practices of racial segregation" (R. 4).

2. Petitioners moved to dismiss the charges on the ground that the arrests "occurred to enforce a private policy of racial segregation in the use of the facilities at Patterson's Drug Store which does business with the public at large * * * in contravention of the due process, equal protection and freedom of speech provisions of the United States Constitution" (R. 5).

3. Petitioners moved to dismiss the charges on the ground that "the statute is void as being one conceived in iniquity for the purpose of punishing those so called 'Negroes' who might not choose to observe certain community practices of racial segregation in various businesses open to the general public and to help preserve racial segregation of the so called 'Negro' throughout the State of Virginia" in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (R. 8).

(b) The federal questions relating to the third question presented in this petition were raised in the following manner:

1. As to the systematic exclusion of Negroes from the jury, an objection was raised first by a written challenge to the array (R. 10, T. 11) and pressed orally as a federal question before the trial judge on the ground that the designation by race of the jury list violated the due process and equal protection clauses of the Fourteenth Amendment (T. 12).

2. The question of the refusal of the trial court to allow prospective jurors to answer questions relating to membership in organizations committed to racial segregation

in Virginia was raised by the list of questions, submitted to the trial judge, which were to be propounded to the jurors (T. 20).

3. As to the segregated courtroom, the federal question was raised by a "Request for the Removal of Race Signs" expressly claimed to violate the Fourteenth Amendment (R. 3), and by a motion "To Abolish Racially Segregated Seating During Trial," claimed to violate the due process clause of the Fourteenth Amendment (R. 10, 11). The latter motion was also made orally before the trial judge (T. 14).

4. The constitutional question relating to the continuing bias and hostility of the trial judge which fatally infected the trial was raised in petitioners' "Request that Judge Disqualify Himself" (R. 12).

Exception to denial of all of the foregoing motions was properly noted (R. 9) and the motions were renewed at the close of the prosecution's case (T. 90), and again at the close of the defendants' case (T. 105). The grounds of the motions were asserted as the basis for a motion for a new trial (R. 13), and were assigned as error on appeal to the Virginia Supreme Court of Appeals (R. 15-16).

Reasons for Granting the Writ

A writ of certiorari should be granted in this case because its facts present what may well be the most important domestic public issue confronting our nation—the demand by the Negro population for first-class citizenship. The continued rejection of this demand by the officials of the Commonwealth of Virginia raises commanding issues of constitutional law which should be, but have not yet been, settled by this Court.

Petitioners contend that their convictions are unlawful and must be reversed because Virginia, from the first of its manifold involvements with this case to the last, has deprived them of their constitutional rights.

First, by licensing Patterson Drug Company and acquiescing in its adherence to the state custom of racial discrimination—indeed, by encouraging such discrimination—Virginia made the Company's refusal to serve petitioners its own, and thereby denied petitioners the equal protection of the laws.

Second, by arresting petitioners and convicting them of criminal trespass for seeking service at Patterson's lunch counter under "emergency" legislation enacted to preserve lunch counter segregation, Virginia used its full executive, legislative and judicial power to enforce the Company's racial discrimination, again denying petitioners the equal protection of the laws.

Finally, by trying petitioners before a jury selected from a list revealing the potential jurors' color, by denying petitioners the right to ask potential jurors whether they belonged to organizations advocating racial hatred, and by requiring petitioners to be tried in a segregated courtroom before a judge who repeatedly demonstrated his bias against petitioners and their counsel, Virginia again denied petitioners the equal protection of the laws and deprived them of their liberty and property without due process of law.

If petitioners had all been white rather than Negro, they would have been served at the lunch counter, they would never have been asked to leave, there would have been no arrests, and—even if they had been prosecuted—the features of the trial prejudicial to Negroes would never have affected them. Virginia therefore subjected petitioners to a long series of prejudicial disparities solely because of their race.

I

The Public And Licensed Character Of Patterson Drug Company And Virginia's Authorization And Encouragement Of Patterson's Racial Discrimination Made The Refusal Of Service To Petitioners State Action Which Deprived Them Of The Equal Protection Of The Laws.

If petitioners had a constitutional right to service at the lunch counter, their refusal to leave was lawful and the State was powerless to make their exercise of that right a criminal act. *Boynton* v. *Virginia*, 364 U. S. 454 (1960). While the Fourteenth Amendment erects no shield against purely private discrimination, *Civil Rights Cases*, 109 U. S. 3 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), petitioners had a constitutional right to be served because, under all the circumstances, Patterson's discrimination against them was imputable to the State.

It is now well settled in cases of this character that the private ownership of the establishment is not controlling and that the "property rights" of the owners are not absolute. As this Court said in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506 (1946):

> "• • • the corporation's property interests [do not] settle the question. The State urges in effect that the Corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[2]

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[2] See also: *State* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2360-62 (Baltimore Crim. Ct. 1959); *Freeman* v. *Retail Clerks Union*, 45 Lab. Rel. Ref. Man. 2234, 2342 (Wash. Super. Ct. 1959); *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277 (Magis. Ct. 1948). Compare *Republic Aviation Inc.* v. *N. L. R. B.*, 324 U. S. 793 (1946).

The privilege of "opening its property for use by the public in general" was conferred on the Patterson Drug Company by the State. In Virginia, as in Louisiana, restaurants, whether in a drug store, department store, or bus terminal, are a part of the public life of the community —a form of private property affected with a public interest. *Garner* v. *Louisiana*, 368 U. S. 157, 177, 181 (1961) (Douglas, J. concurring). They are subject to state regulation, and Patterson Drug Company in fact operated under a business license (T. 72). This license, as Mr. Justice Douglas pointed out in *Garner*, was derived from the public. Since Negroes are as much a part of the public as whites, a license to establish a public facility necessarily imparts, in law, equality of use for all members of the public.[3]

Virginia Code, Sec. 18-327 requires segregation of the races in places of public entertainment and assembly. This statute has been held to apply to restaurants. *Nash* v. *Air Terminal Services*, 85 F. Supp. 545, 548 (E. D. Va. 1949), *Air Terminal Services* v. *Rentzel*, 81 F. Supp. 611 (E. D. Va. 1949). State officials over the years have publicly stated that racial segregation in eating places is required by Virginia law. Washington Post, June 24, 1960, p. A. 1; *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 840 (D. C. Cir. 1961). Where otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer. *Baldwin* v. *Morgan*, 251 F. 2d 780, 787-89 (5th Cir. 1958); *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, 753 (4th Cir. 1955), *appeal dismissed* 351 U. S. 901 (1956). If Patterson Drug Company acted pursuant to a requirement of state law, or pursuant to what state officers represented to be state law

[3] *Garner* v. *Louisiana*, 368 U. S. at 184 (Douglas, J., concurring).

[Cf. *Monroe* v. *Pape*, 365 U. S. 167 (1961)], the presence of unconstitutional state action cannot be doubted.

But even if, as the Attorney General[4] of Virginia has now belatedly declared, restaurant segregation is not in terms required by State law, the requirement of state action is met by Virginia's affirmative authorization and encouragement of that policy. In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), a municipality leased premises to a private establishment which allegedly practiced racial discrimination. This Court held that since the municipality could have forbidden discrimination in the lease, its failure to do so was in effect unconstitutional state inaction:

> "* * * [I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibility under the Fourteenth Amendment imposed on the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be * * * By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (365 U. S. at 725)

The concurring opinion of Mr. Justice Stewart and the dissents of Mr. Justice Harlan, (joined by Mr. Justice Whittaker) and of Mr. Justice Frankfurter, all agreed that a statute authorizing (as distinguished from requiring) discriminatory classification based exclusively on color would be "clearly" or "indubitably" unconstitutional. It follows from the various opinions in the *Burton* case that a State may be found to have violated the equal protection

[4] See appendix to *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d at 848-851.

clause not only where it affirmatively required racial discrimination, but also where the State authorized it or, by its inaction, permitted it to continue in an activity affected with a public interest.[5]

But Virginia has not restricted itself to mere tolerance of racial discrimination in licensed public facilities. By means of a long-standing and intransigent policy in favor of segregation of the races, the State has affirmatively committed itself to the preservation of a deep-seated custom [6] of racial segregation and has in effect served notice on the

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[5] See also *McCabe* v. *Atchison, T & SF Ry. Co.*, 235 U. S. 151 (1914) (State statute affirmatively permitting but not requiring railroads to provide unequal facilities to Negroes is invalid); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and "Private" Racial Discrimination*, 59 Mich. L. Rev. 993, 998, 1012 (1961), noting "a respectable amount of judicial authority for the proposition that state inaction or official nonfeasance can be regarded as state action," and "that affirmative state permission for private action can likewise be regarded as state action."

[6] This Court explicitly stated in the *Civil Rights Cases*, 109 U. S. 3, 25 (1883) that "private" discrimination is free of the interdictions of the Fourteenth Amendment only if "unsupported by state authority in the shape of laws, *customs*, or judicial or executive proceedings." (Emphasis supplied.) Shortly after the Fourteenth Amendment was adopted, Congress made deprivation of constitutional rights pursuant to any custom an actionable civil rights violation. See, e.g., Act of April 9, 1866, 14 Stat. 27; Act of May 31, 1870, 16 Stat. 141, 144; and Act of April 20, 1871, 17 Stat. 13, 42 U. S. C. A. § 1983. While the courts of the Fourth Circuit have taken the position that a State's acquiescence in a long-established custom of segregation does not constitute such state action as is barred by the Fourteenth Amendment [see *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir., 1959); *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 129 (D. Md. 1960), *aff'd per curiam*, 284 F. 2d 746 (4th Cir. 1960)], this view conflicts not only with the *Civil Rights Cases* but also with this Court's decision in *Burton* (which reversed a state court decision relying on *Williams* v. *Howard Johnson's Restaurant supra*), with Mr. Justice Douglas' concurrence in *Garner*, and with the Court of Appeals for the Fifth Circuit. *Baldwin* v. *Morgan*, 287 F. 2d 750, 759 (5th Cir. 1961).

lunch counter proprietor that if he chooses to serve Negroes, he will be challenging the uncompromising policy of the State.

That Virginia has a custom and policy of racial segregation is a "plain fact known to everyone" of which this Court may take judicial notice; to deny it is to raise an issue suggesting the "eerie atmosphere of never-never land." *Meredith* v. *Fair*, No. 19394, F. 2d , 30 U. S. L. Week 2347 (5th Cir. 1962). As its Supreme Court of Appeals said in *Hopkins* v. *City of Richmond*, 117 Va. 692, 86 S. E. 139, 145 (1915), it is the "declared policy of this state that association of the races tends to breach of the peace, unsanitary conditions, discomfort, immorality and disquiet." In 1955, the same court said: "that the preservation of racial integrity is the unquestioned policy of this state, and that it is sound and wholesome, cannot be gainsaid." *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d. 749, 752 (1955), vacated 350 U. S. 891 (1955). The Code of Virginia abounds with statutes [many of them patently unconstitutional; see *Bailey* v. *Patterson*, 30 U. S. L. Week 4164 (U. S. Feb. 26, 1962)] requiring segregation of the races in numerous walks of life.[7]

Virginia's support of racial segregation has survived the passage of time and has manifested itself in the State's opposition to every phase of the current struggle for desegregation. After this Court's landmark decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) had invalidated public school segregation,[8] the Virginia legislature responded with a package of "massive resistance"

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[7] §§18.1-356 and 18.1-357 (places of public entertainment or assembly); § 38.1-597 (fraternal organizations); § 53-42 (prisons); § 56-326 (air terminals), and § 20.54 (interracial marriage).

[8] Cf. Virginia Const. of 1902, Art. IX, § 140, as amended, which required segregation.

laws, some of which have been held unconstitutional. See *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1958) *app. dismissed*, 359 U. S. 1006 (1959). Cf. *NAACP* v. *Patty*, 159 F. Supp. 503 (E. D. Va. 1958), vacated sub nom. *Harrison* v. *NAACP*, 360 U. S. 167 (1959). When it became apparent that one of the leading forces in the fight for desegregation would be the NAACP, Virginia expressed its opposition to that organization's activities in a variety of ways. See, e.g., *NAACP* v. *Patty*, *supra*.[9]

The same pattern has marked Virginia's reaction to the sit-in demonstrators' challenge to segregated lunch counters. Within days of the launching of the lunch counter demonstrations,[10] the legislature, declaring that an emergency existed, passed three laws, all effective immediately, which changed the criminal trespass laws of Virginia to make them a far more formidable obstacle for the sit-in demonstrators.[11] While refusal to leave premises at the proprietor's request had been unlawful under prior law, the legislature, presumably aware that many merchants welcomed Negroes in all parts of their stores except at the lunch counters, made it unlawful to refuse to leave any portion of another's premises at the proprietor's request and expressly provided that such a request might be oral. The legislature also sharply increased the penalties for violation of the statute. In addition to these amendments, the legislature also passed two new laws, one prohibiting the solicitation and encouragement of another to commit trespass, and the second forbidding conspiracies and combinations to commit such crime.

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[9] See also, Scott, *Virginia Justice: If You Can't Get The Law, Get The Lawyer*, The Nation, January 20, 1962, p. 51, which relates the special harassment to which three of the counsel on this petition have been subjected by the Commonwealth of Virginia.

[10] See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L. Journal 315.

[11] Laws of Va., 1960, Ch. 97-99.

It is obvious from the timing and content of the legislation that the "emergency" to which the legislature referred was the challenge of the sit-in demonstrations to lunch-counter segregation. See *Meredith* v. *Fair, supra.* In the words of Virginia's Attorney General, the trespass legislation "protects the owner whose policy is to separate the races and who does in fact operate a segregated restaurant or other eating establishment." [12] The legislature has therefore plainly authorized discriminatory classification based exclusively on color. *Burton* v. *Wilmington Parking Authority, supra.* Without calling the 1960 measures segregation laws, (for to have done so would have assured their invalidation on constitutional grounds), Virginia adopted them in order to preserve its long tradition of segregation. As this Court recently declared in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347-348 (1960):

> "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114."

Since Virginia licensed Patterson Drug Company to serve only white patrons at its lunch counter, unequivocally took the side of the segregating licensee against the Negro seeking service, and did all it could to encourage the preservation of segregation, its role in the refusal of service to petitioners was so substantial as to constitute state action in violation of the Fourteenth Amendment.

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[12] See letter dated August 29, 1960 from Attorney General Harrison to the Commonwealth's Attorney for Roanoke, Virginia, which is appended to *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 848-851, at 851 (D. C. Cir. 1961).

II

The Removal Of Petitioners From The Lunch Counter And Their Arrest And Conviction Constituted State Enforcement Of Racial Discrimination In Violation Of The Equal Protection Clause.

The involvement of Virginia with Patterson Drug Company's racial policies did not end with its licensing and encouragement of that establishment to discriminate against Negroes pursuant to Virginia custom. Had Virginia been merely neutral towards segregation, it could have declined to interfere in the dispute between petitioners and the drug company and permitted the parties to that controversy to work out their dispute themselves by lawful means of persuasion and pressure. *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960). However, by arresting petitioners, compelling them to leave the lunch counter, and convicting them of criminal conduct, Virginia rejected any semblance of neutrality towards discrimination and chose instead to couple its encouragement of racial discrimination with active enforcement. Even if Patterson Drug Company's discrimination is "private", enforcement of that discrimination by the State violates the equal protection clause of the Fourteenth Amendment.

In *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), this Court, while recognizing that voluntary adherence by private individuals to racial restrictive covenants constituted "private" discrimination not subject to the Fourteenth Amendment, held that judicial enforcement of such private discrimination was unconstitutional state action. The action of a state court was held to be the action of the State; accordingly, the state court could not constitutionally prevent a Negro from occupying real property solely because of his race. While the racial discrimination was private in origin, this Court held that the Fourteenth Amendment was not "ineffective simply because the particular pattern of dis-

crimination, which the State has enforced, was defined initially by the terms of a private agreement." That the state courts stood ready to enforce such convenants against whites was immaterial because "equal protection of the laws is not achieved through the indiscriminate imposition of inequalities." This result did not invade the property rights of the parties to the covenant, because

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." 334 U. S. at 22.

The essential teaching of the *Shelley* decision, then, is that the State may not discriminate against an individual on racial grounds irrespective of the origin of that discrimination, and that any "right" of private discrimination is at most the right not to be punished for its practice, and does not carry with it any supplementary right to state enforcement of that discrimination. These principles, frequently reiterated and even expanded [13] since *Shelley*, are

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[13] *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957); *NAACP* v. *Alabama*, 357 U. S. 449, 463 (1958); *Valle* v. *Stengel*, 176 F. 2d 697 (3rd Cir. 1949); *Boman* v. *Morgan*, 4 Race Rel. L. Rep. 1027, 1032 (M. D. Ala. 1959), *aff'd sub. nom. Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960). In the *Boman* case, which involved a Negro's refusal to move to the rear of a privately owned bus, the District Court said:

> "* * * the police officers were without legal right to direct where they should sit because of their color. The seating arrangement was a matter between the Negroes and the Transit Company."

The Court of Appeals quoted this passage in support of its affirmance.

directly applicable to the case at bar.[14] For even conceding, *arguendo*, that the racial discrimination of Patterson Drug Company was private, state action was present in its enforcement, which in this case consisted of petitioners' removal and arrest by the police [*Monroe* v. *Pape*, 365 U. S. 167 (1961)] and of their prosecution and conviction in a Virginia Court, *Shelley* v. *Kraemer*, *supra*.

The applicability of the *Shelley* doctrine has been overlooked[15] or rejected with little or no analysis[16] by the various state courts which have upheld the constitutionality of the criminal convictions of the sit-in demonstrators. The opinions upholding these convictions have generally been based on one or more of the following grounds:

(1) The State trespass statutes are not racial segregation laws, but are "color blind," their sole purpose

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[14] For a more elaborate analysis of the applicability of the *Shelley* doctrine to the criminal prosecutions of sit-in demonstrators, see Schwelb: *The Sit-In Demonstration: Criminal Trespass or Constitutional Right*, 36 N. Y. U. L. Rev. 779, 796-800 (1961).

[15] *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958); *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S. E. 2d 817 (1961); *State* v. *Edwards*, — S. C. — 123 S. E. 2d 247 (S. C. 1961); *City of Greenville* v. *Petersen*, — S. C. — 122 S. E. 2d 826 (S. C. 1961); *State* v. *Goldfinch*, 241 La. 958, 132 So. 2d 860 (1961); *Walker* v. *State*, 103 Ga. App. 70, 118 S. E. 2d 284 (1961); *Briscoe* v. *State*, 341 S. W. 2d 432 (Tex. Crim. App. 1960).

[16] *State* v. *Avent*, 253 N. C. 580, 118 S. E. 2d 47 (1961); *Drews* v. *State*, 224 Md. 186, 167 A. 2d 341 (1961); *Griffin* v. *State*, 225 Md. 422, 171 A. 2d 717 (1961). Appeals or petitions for certiorari are now pending in the *Randolph*, *Avent*, *Drews* and *Griffin* cases and in a number of other similar decisions.

being "to protect people from trespass on their lands;"[17]

(2) The invalidation of trespass convictions of the sit-in demonstrators would interfere with a home owner's property rights and his right of a privacy;[18]

(3) Since the proprietor of a private establishment may use reasonable force to expel trespassers, it would be anomalous and would promote violence and anarchy to deny him the right to resort to the judicial process to do so.[19]

We deal with each of these propositions in turn.

(1) The color-blindness of Virginia's trespass statute on its face will not save it if it is unconstitutional as applied. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). In *Shelley* v. *Kraemer*, *supra*, Missouri's common law rule—that restrictive covenants were enforceable irrespective of whom they excluded—was also neutral on its face. Had a covenant forbidden sale of premises to a Caucasian, the state court would have enforced it just the same. But it was the holding in *Shelley* that even the application of this neutral rule was unconstitutional when invoked to enforce a covenant infected with racial discrimination. Where, at a specific lunch counter, or under a specific covenant, the State excludes or punishes a Negro where it would not exclude or punish a white man, the surface "neutrality" of its law is no more controlling than the "private" origin of the discrimination. Moreover, in the instant case, the circumstances under which the 1960 legislation was enacted indi-

[17] See *State* v. *Avent*, 118 S. E. 2d at 53; *Randolph* v. *Commonwealth*, 119 S. E. 2d at 819.

[18] *State* v. *Avent*, 118 S. E. 2d at 54; *Randolph* v. *Commonwealth*, at 119 S. E. 2d at 819-820.

[19] *State* v. *Avent*, 118 S. E. 2d at 55; *Randolph* v. *Commonwealth*, 119 S. E. 2d at 820; Note, 47 Va. L. Rev. 105, 120-121 (1961).

cate that even its apparent neutrality is illusory (See pp. 14-15, *supra*).

(2) Nor is there merit to the contention that reversal of these convictions would constitute interference with the right of a home owner, or even of the proprietor of a private club, to exclude unwanted guests. In the first place, the Patterson Drug Company is far more "public" than the home or club, for it invites the public to deal with it for commercial gain and is accordingly subject to state regulation, including regulation of its racial policies.[20] While a home owner's right to privacy in the use of his premises is of a very high order indeed, and subject to limitation only on a showing of extreme necessity, *Frank* v. *Maryland*, 359 U. S. 360 (1960); *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the Patterson Drug Company was seeking trade, not privacy. The only property interest involved in this case is the asserted right of a licensed proprietor whose establishment is open to the public, including Negroes, to discriminate against Negroes in one small part of his store.

Moreover, the arrest and conviction for trespass of unwanted guests in a private home—even a home from which all Negroes are excluded—differs from this case in that it could not reasonably be termed state enforcement of racial discrimination. If a Negro enters a private home and refuses to leave, and is prosecuted by the State, he is being prosecuted as a trespasser and not as a Negro. There is in such a case no equivalence between Negroes as a class and trespassers as a class. Any white man who enters the home and who is not an invitee of the owner would similarly be prosecuted. The class of persons who would be prosecuted on refusal to leave includes most whites (i.e. all uninvited whites) and all Negroes. In the case of the Patterson Drug Company, however, all whites who dressed

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[20] See Greenberg, *Race Relations and American Law*, Appendix A, para. 6, pp. 375-379, for a collection of such anti-discrimination laws.

and behaved properly would have been served,[21] whereas all Negroes would have been asked to leave. A substantial identity existed between "trespassers" (the class ostensibly discriminated against) and "Negroes". Where what purports to be the State's legitimate discrimination against trespassers is in fact discrimination against Negroes, it is unconstitutional irrespective of its label. *Shelley* v. *Kraemer*, *supra*.[22]

(3) The "clincher" argument used by the State courts to uphold criminal convictions of the sit-ins—that to deny lunch counter proprietors state aid in excluding "trespassers" would encourage resort to self-help and lead to violence and anarchy—is also wide of the mark. It is settled that a state may not deny Negroes their constitutional rights on the pretext of avoiding violence, for it is the duty of the state both to protect those rights and to control violence. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Additionally, it is unlikely that a store proprietor would resort to self-help, for he seeks trade, not violence.

Moreover, resort to self-help is permissible only to enforce rights which the police may lawfully enforce—"in situations", as Dean Prosser has said, "where there is usually no time to resort to law." Prosser, *Torts*, 2d ed.

[21] Except, perhaps those accompanied by Negroes. A State's discrimination against Negroes does not, of course, become constitutional simply because the State also discriminates against whites who accompany Negroes.

[22] See Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right*, 36 N. Y. U. L. Rev. 779, 798-800 (1961), for a detailed discussion of the distinction between the instant situation and that presented by the arrest of a trespasser of an "all white" private club.

(1955), § 21, p. 92.[23] It follows that where the basic right—to have petitioners arrested—does not exist, the supplementary right of self-help does not exist either. To argue that to hold police action invalid will bring about "lawful" self-help is inherently contradictory. If the arrest would be unlawful, as we argue here, the use of self-help would also be unlawful. And if a State, by judicial decision or legislative fiat, purported to expand the law of self-help to embrace the instant situation, it would, "ingeniously or ingenuously", be circumventing the prohibition against removal of patrons by the police on racial grounds. *Cooper* v. *Aaron*, 358 U. S. at 17.

The court below having summarily decided important constitutional questions against petitioners in a manner which conflicts with decisions of this Court condemning state enforcement of private discrimination, certiorari should be granted to review its decision.

III

Virginia Denied Petitioners The Equal Protection Of The Laws And Deprived Them Of Their Liberty Without Due Process Of Law By Compelling Them To Stand Trial Before An Unconstitutionally Selected Jury And A Biased Judge In A Segregated Courtroom.

We have indicated in our discussion of the first two questions presented in this petition that Virginia's application of its trespass law to these petitioners denied them substantive rights guaranteed by the Fourteenth Amendment. If certiorari is granted in connection with these questions, and if our contentions with respect to them are correct, petitioners' convictions must be reversed and the indictments dismissed. But even if this Court rejects those contentions, we believe that certiorari should be

[23] See Schwelb, 36 N. Y. U. L. Rev. at 800-804, for an extensive discussion of the problems of "self-help" in the context of the sit-ins.

granted and that petitioners should have a new trial because they were denied the fair jury, fair judge and neutral judicial atmosphere required by the Fourteenth Amendment and by the decisions of this Court.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U. S. 133 (1955). To meet the standards of the Fourteenth Amendment, the State must provide a panel of "impartial, indifferent jurors," *Irvin* v. *Dowd*, 366 U. S. 717 (1961); an impartial judge, *Tumey* v. *Ohio*, 273 U. S. 510 (1927), *Payne* v. *Lee*, 222 Minn. 269, 24 N. W. 2d 259, 263-264 (1946), and a neutral judicial atmosphere, *Irvin* v. *Dowd*, *supra*, *Moore* v. *Dempsey*, 261 U. S. 86 (1923). The trial which Virginia afforded these petitioners met none of these requirements.

Going first to the impartiality of the jury, it is axiomatic that the systematic exclusion of Negroes from a petit jury trying Negro defendants violates the equal protection clause of the Fourteenth Amendment. *Avery* v. *Georgia*, 345 U. S. 559 (1953). Moreover, refusal by the Court to hear evidence in support of an allegation of systematic exclusion constitutes a denial of equal protection. *Carter* v. *Texas*, 177 U. S. 442 (1900). When petitioners' counsel sought to offer such proof, the court summarily dismissed his attempt:

> "I don't know what you are talking about. If you mean on the list of jurors selected by the Jury Commission the list indicates the white men, the colored men, the white women, the colored women, that is a fact; no evidence need be taken." (T. 11-12).

The racial markings on the list of jurors were made pursuant to an order of the court:

> "Following the instructions of the Court as to their duties they were to perform, [the Jury Commission]

listed white men in one list, white women in one list, colored men in one list and colored women in another list." (T. 30).

In *Avery* v. *Georgia, supra*, this Court held that a substantially identical kind of arrangement (white tickets for white jurors, yellow tickets for Negroes) constituted a *prima facie* case of discrimination in the selection of the jury. "When a prima facie case of discrimination is presented, the burden falls, forthwith, upon the State to overcome it." 345 U. S. at 563. In the case at bar, the state failed to come forward with any evidence whatever. Consequently, systematic exclusion of Negroes is established and requires the reversal of the convictions below.

Further curtailment of petitioners' right to an impartial, indifferent jury occurred in connection with the examination of the jurors on voir dire. Petitioners' counsel sought to ask potential jurors a series of fifteen questions respecting their qualifications (T. 16), including a question as to their membership in the White Citizens' Council, The Defenders of State Sovereignty, and the Ku Klux Klan (T. 20). The court did not permit any of these questions and simply asked the jurors, in conclusory terms, whether they could give petitioners a fair trial (T. 7-9). The only juror who asked to be disqualified did so—ironically—because he belonged to a municipal interracial organization (T. 9).

We submit that the constitutional right to a neutral jury is meaningless if it is not accompanied by a constitutional right to conduct a reasonable investigation into potential jurors' prejudices. See *Irvin* v. *Dowd, supra*. Even where no racial dispute is involved, it has been held to be reversible error in a long line of cases to refuse to permit questions on voir dire examination, asked in good faith, as to membership in the Ku Klux Klan or White Citizens Council. *Smith* v. *United States*, 262 F. 2d 50 (4th Cir. 1958). This case, like all sit-in cases, had a tendency to

arouse strong emotions of a racial nature and it is a reasonable inference that membership in a white supremacist organization would be likely to prejudice the potential juror aginst participants in anti-segregation demonstrations:

> "• • • [S]trong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute sufficient objection to him." Chief Justice Marshall in Burr's Trial, 1 Burr Trial 416 (1867) quoted in *Reynolds* v. *United States*, 98 U. S. 245 (1879), and more recently in *Irvin* v. *Dowd*, *supra* at 722.

Yet the barring of questions on voir dire with respect to membership in white supremacist organizations not only made it impossible for petitioners to challenge members of such organizations for cause, but also prevented them from making effective use of their peremptory challenges. The jurors' conclusory affirmations that they could try the case fairly were of little significance when the Court foreclosed inquiry into the critical facts behind those conclusions. *Irvin* v. *Dowd*, 366 U. S. at 723. Petitioners grant they have "no constitutional right to friends on the jury" (*Fay* v. *New York*, 332 U. S. 261, 289), but they claim a correlative constitutional right not to be tried by their enemies.

(2) Another element of Virginia's denial of petitioners' constitutional right to an impartial tribunal was the constant hostility exhibited by the judge towards petitioners and their counsel in the presence of the jury. Perhaps the most glaring examples of this hostility occurred on the occasions when petitioners' counsel sought to raise constitutional defenses. When counsel sought to challenge the constitutionality of identifying potential jurors' race, the court held him in contempt:

> "I am thinking you are in contempt of court because the court is neither aiding nor blocking the adminis-

> tration of justice * * * Now for you to cast that type of aspersion upon this court and its conduct, you are in contempt of Court. I will not now fix the punishment for that contempt but will do that later." (T. 13).

The judge again held petitioners' counsel in contempt (and again postponed punishment until the end of the trial) when counsel moved for an order ending all segregation in the courtroom and asked the judge to disqualify himself upon his denial of the motion (T. 15). On another occasion, the judge rebuked counsel for reasserting constitutional defenses, remarking that "I don't know where you studied law" (T. 106), and on still another suggested that counsel's attempts to question potential jurors on voir dire were "captious" (T. 18).

Petitioners submit that a fair trial is impossible where the court permits the threat of a contempt citation to hang over counsel's head for the assertion of reasonable and meritorious constitutional defenses. Aside from the threat of punishment to himself, counsel must necessarily wonder whether, by asserting these defenses, he is annoying the court to the detriment of his clients. Moreover, it is hardly possible for the jury not to be influenced by the judge's constant rebuking of one of the attorneys. In the instant case, a reading of the entire record reveals that the judge rebuked or chided petitioners' counsel almost every time he spoke, often in the most discourteous language; for example, "I don't want to hear any more from you" (T. 75). See also the judge's examination of one petitioner at T. 97, 98-100, 103-105.

In *Offutt* v. *United States*, 348 U. S. 11, 13 (1954), Mr. Justice Frankfurter, speaking to the very problem posed here, said that courts have the duty

> "to safeguard two indispensable conditions to the fair administration of justice: (1) counsel must be protected in the right of an accused to 'fearless,

> vigorous and effective advocacy, no matter how unpopular the cause in which it is employed, (2) equally so will this court 'protect the processes of orderly trial, which is the supreme object of the lawyer's calling.'"

The judge presiding at petitioners' trial clearly transgressed these standards, with the inevitable consequence that his bias toward petitioners' counsel was cast by the jury upon the petitioners themselves.

(3) Petitioners were also denied an impartial tribunal by being compelled to stand trial in a segregated courtroom. In response to counsel's attempt to establish for the record that the courtroom was in fact segregated, the trial judge said:

> "This Court seats people in the Court-Room in seats designated and in order to preserve quiet and general Court Room decorum, and in addition to prevent disorder among spectators, it has seats for colored persons and seats for white persons." (T. 11)

The judge again defended racial segregation in the courtroom at T. 14 and T. 20. Moreover, signs in all parts of the courthouse designated separate toilet and other facilities for whites and Negroes.

It is now firmly settled that segregation constitutes racial discrimination, *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and that the State may not justify such discrimination on the pretext of preventing disorder. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Nor can it be doubted that the segregation in the courtroom which the judge refused to terminate, was "state action." *Shelley* v. *Kraemer*, *supra*. The only question is whether this plainly unconstitutional arrangement operated against the

petitioners as well as against unlawfully segregated Negro spectators.[24]

We submit that it is impossible for a Negro to receive a fair trial in a segregated courtroom, probably in any case, and certainly, as here, where segregation at lunch counters was itself on trial. The rationale of the *Brown* decision, *supra*, was that segregation of the races imposes a status of inferiority upon Negroes. This is true not only in schools but also in a myriad of other activities. See *Gayle* v. *Browder*, 352 U. S. 903 (1956) (buses); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955) (golf courses); *State Athletic Commission* v. *Dorsey*, 359 U. S. 533 (1959) (athletic events); *Bailey* v. *Patterson*, 30 U. S. L. Week 4164 (U. S. Feb. 26, 1962) (transportation). Courtroom segregation under the aegis of the court itself places the stamp of official approval upon this badge of inferiority, and must inevitably affect the jurors' attitude towards Negro defendants, witnesses and attorneys, and their assessment of the culpability (or degree of culpability) of a "trespass" designed to combat segregation at lunch counters. Even if, as the court repeatedly ruled, the racial motivation of petitioners' exclusion from the lunch counter was not to be considered by the jury (T. 75), it was the jury's function to determine punishment. By conducting the trial in a segregated courtroom, Virginia in effect told the jury that the lunch counter segregation which petitioners had challenged was proper and in accordance with state policy. It is impossible to determine to what extent the finding that petitioners were guilty—and the punishment to which they were sentenced—were affected by this stamp of approval which Virginia gave to the practice of segregation of the races.

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[24] While a party's constitutional rights must ordinarily be asserted by that party, there is authority for the proposition that under the unusual circumstances of this case, the spectators' constitutional rights may be asserted by petitioners. See *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Bailey* v. *Patterson*, 30 U. S. L. Week 4164 (U. S. Feb. 26, 1962).

We believe that each one of the above departures from the constitutional guarantee of a fair tribunal constitutes sufficient ground for reversal of petitioners' convictions, and that the totality of circumstances rendered the proceedings so fundamentally unfair as to constitute a denial of due process of law. In any event, the issues presented by the denial of petitioners' motions, particularly those respecting the questions to jurors about their affiliations with white supremacist groups and the challenge to the segregated courtroom, present novel constitutional questions of overriding importance, common to thousands of trials of Negroes in many parts of the country, which have not yet been, but should be resolved by this court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Melvin L. Wulf,
Frank E. Schwelb,
American Civil Liberties Union,
156 5th Avenue,
New York 10, N. Y.

Joseph A. Jordan, Jr.,
Edward A. Dawley, Jr.,
Leonard W. Holt,
721 E. Brambleton Avenue,
Norfolk 10, Virginia.

Henry Halvor Jones,
Simon Lawrence Cain,
815 Fifth Street, N.W.,
Washington 1, D. C.,
of Counsel.

Appendix

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of October, 1961.

The petition of Virgil A. Wood for a writ of error and supersedeas to a judgment rendered by the Corporation Court for the City of Lynchburg on the 6th day of April, 1961, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.